

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

GARY M. HOWARD,

Case No. 23-12549

Plaintiff,

F. Kay Behm

v.

United States District Judge

Seifert, J., *et al.*,

Kimberly G. Altman

United States Magistrate Judge

Defendants.

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**OPINION AND ORDER OVERRULING PLAINTIFF'S OBJECTIONS AND  
ACCEPTING AND ADOPTING MAGISTRATE JUDGE'S JANUARY 5, 2024  
REPORT AND RECOMMENDATION (ECF No. 25)**

**I. PROCEDURAL HISTORY AND REPORT AND RECOMMENDATION**

Currently before the Court is Magistrate Judge Kimberly G. Altman's January 5, 2024 Report and Recommendation. (ECF No. 25). Magistrate Judge Altman construed Plaintiff's motion for summary judgment as a motion for default judgment against Defendant Home Depot and recommends that it be denied. *Id.* Plaintiff filed objections to the report and recommendation, albeit untimely. (ECF No. 30). Home Depot filed a response to Plaintiff's objections. (ECF No. 31).

On November 16, 2023, a certificate of service was filed as executed as to Home Depot on November 3, 2023, with an answer due November 27, 2023.

(ECF No. 14). The green card indicates the service packet was mailed to the Home Depot address in Canton, Michigan that Howard provided, and signed by an unidentified person on November 3, 2022. *Id.* The green card also indicates that the service packet was mailed via certified mail with signature required/restricted delivery. *Id.*

Judge Altman first concluded that Plaintiff's request for a default judgment was improper because no default had yet entered against Home Depot, as required by Federal Rule of Civil Procedure 55(a). (ECF No. 25, PageID.128-29). Secondly, Judge Altman concluded that the court was without jurisdiction to issue a default judgment against Home Depot because proper service of process had not been effectuated. *Id.* at PageID.129-133. She explained that Plaintiff did not serve Home Depot in accordance with Federal Rule of Civil Procedure 4(h) and Michigan Court Rule 2.105(D), and thus no default judgment could issue. *Id.*

For the reasons set forth below, Plaintiff's objections (ECF No. 30) are **OVERRULED**, the Magistrate Judge's January 5, 2024 Report and Recommendation (ECF No. 25) is **ACCEPTED** and **ADOPTED**, and Plaintiff's motion for default judgment (ECF No. 22) is **DENIED**.

## II. STANDARD OF REVIEW

A party may object to a magistrate judge's report and recommendation on dispositive motions, and a district judge must resolve proper objections under a de novo standard of review. 28 U.S.C. § 636(b)(1)(B)-(C); Fed. R. Civ. P. 72(b)(1)-(3). This court "may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id.* "For an objection to be proper, Eastern District of Michigan Local Rule 72.1(d)(1) requires parties to 'specify the part of the order, proposed findings, recommendations, or report to which [the party] objects' and to 'state the basis for the objection.'" *Pearce v. Chrysler Grp. LLC Pension Plan*, 893 F.3d 339, 346 (6th Cir. 2018). Objections that dispute the general correctness of the report and recommendation are improper. *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995).

Moreover, objections must be clear so that the district court can "discern those issues that are dispositive and contentious." *Id.* (citing *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991)); *see also Thomas v. Arn*, 474 U.S. 140, 147 (1985) (explaining that objections must go to "factual and legal" issues "at the heart of the parties' dispute"). In sum, the objections must be clear and specific enough that the court can squarely address them on the merits. *See Pearce*, 893 F.3d at 346. And, when objections are "merely

perfunctory responses . . . rehashing . . . the same arguments set forth in the original petition, reviewing courts should review [a Report and Recommendation] for clear error.” *Ramirez v. United States*, 898 F.Supp.2d 659, 663 (S.D.N.Y. 2012); *see also Funderburg v. Comm’r of Soc. Sec.*, No. 15-10068, 2016 WL 1104466, at \*1 (E.D. Mich. Mar. 22, 2016) (Hood, J.) (noting that the plaintiff’s objections merely restated his summary judgment arguments, “an approach that is not appropriate or sufficient”).

### III. PLAINTIFF’S OBJECTIONS

#### A. Failure to Obtain Entry of Default

Plaintiff does not specifically object to the Magistrate Judge’s analysis regarding the failure to obtain a default but attaches to his objections a request for Clerk’s Entry of Default dated January 22, 2024. (ECF No. 30, PageID.157). However, Plaintiff cannot now seek entry of default because Home Depot has filed an answer to the complaint. (ECF No. 26). *See Taylor v. Countrywide Home Loans*, 2008 WL 5273898, at \*2 n.3 (E.D. Mich. Dec. 18, 2008) (“Even if the answer were not timely filed, if a defendant answers or otherwise defends *before* the clerk of the court actually enters a default, no default may enter.”) (citing *Horacek v. Wilson*, 2008 WL 4093721, at \*1 n. 1 (E.D. Mich. Aug. 28, 2008)). Accordingly, to the extent Plaintiff objects to the Magistrate Judge’s recommendation based

on a belated attempt to obtain a Clerk's Entry of Default, that objection is

**OVERRULED.**

B. Service of Process

Plaintiff does not dispute the correctness of the Magistrate Judge's analysis and conclusion that service of process on Home Depot was improper under applicable law. Instead, Plaintiff argues that Home Depot had actual notice of the lawsuit. He points out that after the summons and complaint were returned executed, Janal Young, Home Depot's claims examiner, reached out to Plaintiff. (ECF No. 30, PageID.158). According to Plaintiff, this clearly shows that Home Depot was aware of his lawsuit on November 20, 2023 and thus, had been served.

However, as Home Depot points out, even if it had been aware of the suit, the Sixth Circuit holds that "actual knowledge of the lawsuit does not substitute for proper service of process[.]" *Friedman v. Estate of Presser*, 929 F.2d 1151, 1155 (6th Cir. 1991) (collecting cases). Indeed, the Sixth Circuit concluded that "[d]ue to the integral relationship between service of process and due process requirements, we find that the district court erred in its determination that actual knowledge of the action cured a technically defective service of process." *Id.* at 1156. The Magistrate Judge correctly found that service on Home Depot did not

comply with applicable law and Plaintiff has offered no evidence or authority showing that service was proper. Accordingly, this objection is **OVERRULED**.

#### **IV. CONCLUSION**

For the reasons set forth above, Plaintiff's objections (ECF No. 30) are **OVERRULED**, the Magistrate Judge's January 5, 2024 Report and Recommendation (ECF No. 25) is **ACCEPTED** and **ADOPTED**, and Plaintiff's motion for default judgment (ECF No. 22) is **DENIED**.

**SO ORDERED.**

Date: April 19, 2024

s/F. Kay Behm  
F. Kay Behm  
United States District Judge